What is Tort Law For? Part 1.
The Place of Corrective Justice (2011)

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What is Tort Law For?
Part 1. The Place of Corrective Justice

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1. The ends of tort law

What is tort law for? This may strike some as a leading question. It may seem to predispose us towards what Ernest Weinrib calls a 'functionalist' answer: an answer that makes tort law the servant of some 'external end', such as the minimization of suffering, the compensation of injuries, or the prevention of accidents. According to functionalists, says Weinrib,

> the justificatory worth of the [law's] goals is independent of and external to the law that they justify. To continue with the tort example, deterring accidents and compensating accident victims are socially desirable quite apart from tort law. … If tort law forwards

* Professor of Jurisprudence, University of Oxford. This paper is a remote descendant of my Lord Upjohn Lecture, 'What is Tort Law For?', delivered to the Association of Law Teachers at Gray's Inn, London on 6 June 2003. Since then different versions (with various names) have been presented at Dartmouth College, the Australian National University, the University of Oxford, the University of East Anglia, the University of Texas at Austin, Yale Law School, the University of Glasgow, and the American Philosophical Association (Eastern Division) in New York. Many people – too many to list or even to keep track of – made valuable comments and suggestions on these occasions, leading to countless revisions and reorientations. Allow me, however, to reserve special mention for Sameer Singh, Andrew Gold, Aditi Bagchi, Prince Saprai, Matthew Henken, Ben Zipursky, and Jules Coleman.

them, so much the better. The goals, however, are independently justifiable and do not derive their validity from tort law.[1]

Isn't it possible, as Weinrib replies to the functionalists, that tort law is 'its own end'? To put it less cryptically, isn't it possible that tort law has some ends that are internal to it in the sense that tort law helps to constitute them, and not merely to serve them? Yes, it is possible. But the question 'what is tort law for?' does not suggest otherwise. It is not a functionalist question in Weinrib's sense. True, it is a teleological question. It assumes that tort law is the kind of thing that has ends. But it does not assume that these ends are exclusively or mainly 'external'. At any rate, I ask the question without building in that assumption. For above all I want to assess the anti-functionalist answer to it that Weinrib himself endorses. What tort law is for, according to Weinrib, is to do justice between the parties to a tort case. More specifically, it is to do *corrective* justice between the parties to a tort case. Corrective justice is a special kind of justice that, according to Weinrib, the law of torts helps to constitute, and not merely to serve. To that extent, tort law exists for its own special end.

The question 'what is tort law for?' may also seem to harbour an elementary ambiguity. In Jules Coleman's words:

> There is an important and familiar distinction between theoretical explanations and theoretical justifications. While both can illuminate or deepen our understanding, explanations do so by telling us what the nature of a thing is, or by telling us why things are as they are; by contrast, justifications seek to defend or legitimate certain kinds of things – for example, actions, rules, courses of conduct, practices, institutions, and the like.[2]

In asking what tort law is for, is one asking for an explanation or a justification? The choice, it seems to me, is a false one. True,

[1] *The Idea of Private Law* (Cambridge, Mass 1995), 4.
[2] *The Practice of Principle* (Oxford 2001), 3.

not all explanations are justifications. But all justifications are explanations. To justify something is to explain it rationally. It is to set out some or all of the reasons why it is as it is.[3] Anyone who tries to explain anything in terms of reasons for it cannot but be concerned with the justification of that thing. Coleman himself, like Weinrib, seeks to explain tort law in terms of corrective justice. Since 'corrective justice' designates a kind of reason – or more precisely, a kind of norm, norms being givers of reasons – this is an unavoidably justificatory enterprise.

Both Coleman and Weinrib shy away from presenting their enterprises as justificatory. Weinrib claims that tort law itself is a justificatory enterprise, but he equivocates about whether he, in invoking corrective justice, is in turn attempting to justify the justificatory enterprise of tort law.[4] Coleman is more forthright. He denies that his enterprise of explaining tort law in terms of corrective justice is a justificatory one.[5] Why? Because he wants to emphasize that he is remaining aloof from two important questions. Firstly, he is remaining aloof from the question of

[3] See my 'Justifications and Reasons' in Gardner, *Offences and Defences* (Oxford 2007). Strictly speaking, justification is but one type of rational explanation. The other type is excuse. Rational explanation is in turn but one type of teleological explanation. Non-rational but teleological explanations include the explanation of plant behaviour as phototropic. Plants are goal-oriented creatures with no rationality, and hence the goals of which are not open to rational scrutiny. Teleological explanations are in turn a sub-class of causal explanations, using 'causal' in its broad Aristotelian sense. Often, however, 'causal' is used in a narrow sense to refer only to those broadly causal explanations that are non-teleological. Causal explanations in this narrow sense do not cite a goal to be achieved in the future but an explanatory factor in the past. Many errors in many fields of inquiry come of (a) recasting rational explanations as causal in the narrow sense or (b) treating 'functional' explanation as a *tertium quid* between rational explanation and causal explanation in the narrow sense, when there is no such *tertium quid*.

[4] See John Gardner, 'The Purity and Priority of Private Law', *University of Toronto Law Journal* 46 (1996), 459 at 464.

[5] Coleman, *The Practice of Principle*, above note 2, 5-6.

whether any norms of corrective justice are sound norms. Secondly, he is remaining aloof from the question of whether those norms of corrective justice that are sound, if any, have enough force to support the retention of tort law in the face of well-known objections to it (e.g. its hugely expensive litigation industry, its consequent encouragement of disproportionately risk-averse behaviour, its corollary stimulation of ambulance-chasing, claim-harvesting, and other miserable types of money-grubbing behaviour, its tendency to instill in each of us a sense that someone, meaning someone else, must always be to blame, and its perverse incentivization – to be discussed in section 3 below – of justice-evading behaviour).

Coleman is certainly entitled to remain aloof from these questions. But he should not conclude that his enterprise is non-justificatory. To see why, consider his own remarks about economists of law who try to remain aloof from similar questions about the force of economic reasons:

> [W]e could wonder why we should be concerned about which liability rules are [economically] efficient. There must be a policy reason behind interests; and as long as there is, the question of the normative roots of efficiency will still be with us. Still, there is a difference between saying: If you want to promote utility or wealth then these are the rules you should adopt; and saying: Because these rules would promote utility or wealth … we should adopt them.[6]

There is clearly a difference between these two statements. But equally clearly it is not the difference between a non-justificatory statement and a justificatory one. Both are statements about what should be done and why, and hence both are justificatory. They differ only in that the first is noncommittal, whereas the second is committal. A committal justificatory statement or inquiry is a

[6] 'Efficiency, Utility, and Wealth Maximisation' in Coleman, *Markets, Morals and the Law* (Cambridge 1988), 95 at 359n64.

statement or inquiry about what is justified. A noncommittal justificatory statement or inquiry is a statement or inquiry about what would be justified if certain conditions were to hold, leaving open the question of whether they do indeed hold. Coleman's inquiry fits the latter specification. He is asking whether, *if* the relevant norms of corrective justice were sound, and *if* all else were equal, tort law would be justified.[7] His answer is yes. To my way of thinking, this makes 'corrective justice' Coleman's provisional answer to the question 'what is tort law for?', understood as a justificatory question. I say 'provisional' because of course he still has the option of concluding that the relevant norms of corrective justice are unsound, or that, although sound, they lack sufficient force to repel some or all of the plethora of competing considerations that militate against the retention of some or even all of the law of torts.

Coleman argues, indeed, that corrective justice can supply a *complete* answer to the question 'what is tort law for?' He argues that 'the theory' (viz. corrective justice) provides 'a complete account of what it purports to explain' (viz. the law of torts).[8] Here he does not mean to retreat from his noncommittal justificatory stance. He only means to fortify his noncommittal justificatory claim. He means: If the relevant norms of corrective justice were sound, and if all else were equal, then norms of corrective justice would be *all that one needs* to justify the main (he calls them 'structural') features of the law of torts.

Here too Coleman and Weinrib converge. As Weinrib puts the point, 'the analysis of tort law in terms of possible aims such as compensation or deterrence is incompatible with the understanding of tort law as the operation of corrective justice.'[9] At first sight this claim seems unrelated to Coleman's. It suggests that, in justifying tort law, no extra considerations *can* be

[7] *The Practice of Principle*, above note 2, 5.
[8] Ibid, 34.
[9] *The Idea of Private Law*, above note 1, 212.

conjoined with norms of corrective justice, not that no extra considerations *need* be conjoined with norms of corrective justice. But it turns out that Weinrib regards the latter claim as inseparable from the former. Both are aspects of what Weinrib calls the 'autonomy' of private law as a way of doing justice.[10] So Weinrib's claim is stronger than Coleman's, but it still commits Weinrib, with Coleman, to the completeness of 'corrective justice' as an answer to the question of what tort law is for.

This emphasis on completeness strikes me as peculiar. It seems to me that the first task of both authors, even by their own lights, is to establish the necessity rather than the sufficiency of invoking corrective justice in explaining what tort law is for. Can one explain what tort law is for *without* invoking corrective justice? After all, the main challenges that both authors are trying to fend off are from functionalists,[11] including many in the 'law and economics' tradition, who claim that they can provide complete rational explanations (committal or noncommittal justifications) of tort law from which norms of corrective justice have been excised, usually by reducing them to considerations of other, more purely functionalist, types. One does nothing to refute such claims by showing that one can equally provide complete rational explanations (committal or noncommittal justifications) of tort law from which all considerations *except* considerations of corrective justice have been excised. What would refute the functionalist claim, however, is a demonstration that any complete explanation of tort law – whatever other considerations it may invoke – cannot but invoke considerations of corrective justice. Considerations of corrective justice cannot be reduced out. They are necessary even if not sufficient.

In what follows I will build on the work of Coleman and Weinrib to explore, and ultimately to affirm, this latter view.

[10] Ibid, ch 8 (and *passim*).

[11] Coleman too dubs them 'functionalists', meaning roughly the same by that as Weinrib does: *The Practice of Principle*, above note 2, 13ff.

2. Corrective justice as a form of justice

Norms of justice are moral norms of a distinctive type. They are norms for tackling *allocative* moral questions, questions about who is to get how much of what. Some people think of all moral questions, or at least all moral questions relevant to politics and law, as allocative. But that is a mistake. As a rule, allocative questions are forced upon us only when people make competing claims to assignable goods. Many morally significant goods, including many relevant to politics and law, are either not competed for or not assignable. They include goods such as living in a peaceful world and not being tortured. If one of us lives in a peaceful world then we all do, so this good is not assignable. And in principle there is an unlimited amount of non-torture to go round, so there need be no competition for it. Of course it does not follow that there are no questions of justice that bear on the resort to torture or on the quest for a peaceful world. The point is only that many moral questions about the resort to torture and the quest for a peaceful world are not questions of justice. If, for example, we say of someone who was tortured by the secret police that her treatment was unjust, she might well say, if her moral sensitivity has been left intact, that this misses the point and marginalizes her grievance. She is not complaining that she was the wrong person to be picked out for torture, that she was a victim of some kind of misallocation by the secret police, that she of all people should not have been tortured. She is complaining that torture should not have been used at all, against anyone. Her complaint is one of barbarity, never mind any incidental injustices involved in it.

H.L.A. Hart made much of this point in his famous treatment of the justification of punishment.[12] He argued that the question

[12] See his 'Prolegomenon to the Principles of Punishment' in Hart, *Punishment and Responsibility* (Oxford 1968).

of how to distribute punishments should be regarded as a question of justice. But not so the question of whether to have a practice of punishing in the first place, he thought, for that is not an allocative question. Or is it? Arguably punishment is a special case. Arguably punishing, unlike torturing, is an essentially allocative action, such that one cannot separate the question of whether to indulge in it at all from the question of how to distribute it. Punishment, unlike torture, is by its nature exacted *for* something (viz. for some wrong or supposed wrong). So anyone who begins their evening out by saying 'let's punish some people tonight' is making no sense until we get an answer to the question 'Punish them for what? What are they supposed to have done?' This question is already an allocative question, a question that calls for some rational linking of punishments to the people who will receive them. So arguably, *pace* Hart, one cannot raise any allocation-independent questions about the justification of punishment. Arguably all norms regulating punishment are norms of justice, even though there is no competition for punishment.[13] That, at any rate, is one major objection to Hart's thesis. Convincing or not, it shows that the justification of punishment is a problematic choice for illustrating the distinction between norms of justice and other moral norms. On the other hand, Hart is clearly right to think that there is such a distinction, and right in the way he draws it: norms of justice, he rightly sees, are norms for tackling allocative moral questions. 'They are concerned,' in Hart's own formulation, 'with the adjustment of claims between a multiplicity of persons.'[14]

[13] This is the thesis that Anthony Quinton was groping towards in 'On Punishment', *Analysis* 14 (1954), 512. I am grateful to Les Green for helping me to see how my earlier (more unreservedly Humean) understanding of the domain of justice was too narrow in this respect. Green discusses the issue in his so-far unpublished paper 'The Germ of Justice'.

[14] 'Prolegomenon to the Principles of Punishment', above note 12, at 21.

Hart's treatment is also problematic in another way. The particular norm of justice that Hart regards as the only sound one for allocating punishment does not strictly speaking allocate punishment at all. A norm of justice is one that mentions a *ground* for allocating whatever it is that it allocates. A ground for allocating is a condition of allocation that is also a reason for that allocation. That I am a wrongdoer, most people think, is not just a condition but a reason for punishing me. I should be punished only if *and because* I am a wrongdoer. So there is a sound norm of justice, most people think, according to which wrongdoing grounds punishment (subject to competing considerations, such as excuses). Hart dissents. He accepts that I should be punished only if I am a wrongdoer but he denies that I should be punished *because* I am a wrongdoer. My being a wrongdoer is no reason to punish me. Rather, my not being a wrongdoer is a reason *not* to punish me (as well as a sufficient condition of my non-punishment). Therefore justice, according to Hart, only gives a ground for non-punishment. It gives no ground for punishment. To put the point more formally, there is for Hart no sound norm of justice according to which wrongdoing grounds punishment (even allowing for competing considerations). This idea is well captured by saying that Hart is no retributivist: he endorses no norm of retributive justice, but only a norm of distributive justice that incidentally regulates the allocation of punishment. The norm regulates the allocation of punishment incidentally to regulating the allocation of non-punishment. The idea is not well captured by saying that Hart endorses a 'negative' norm of retributive justice. A norm of retributive justice, if that expression means anything, is a norm according to which (subject to competing considerations) wrongdoing grounds punishment. And Hart endorses no such norm.[15]

[15] For elaboration of these points see my critical introduction to the second edition of Hart's *Punishment and Responsibility* (Oxford 2008), at xxiv-vi.

Norms of justice, to put the lesson concisely and more generally, answer questions about who is to get how much[16] of what *and why* (i.e. on what grounds). As we have just discovered, norms fitting this description can be divided into various types. Aristotle famously taught us to distinguish, at the top level of the classification, between norms of distributive justice and norms of corrective justice.[17] One may well doubt Aristotle's suggestion that every norm of justice is either a norm of distributive justice or a norm of corrective justice. In the light of what we just learned about punishment, shouldn't we treat norms of retributive justice as *sui generis*, and not a mere sub-class of norms of distributive justice?[18] Besides, don't norms of procedural justice (e.g. *audi alterem partem*, *nemo in sua causa iudex*) constitute a distinct type, neither distributive not corrective?[19]

Arguably so. Be that as it may, however, norms of distributive justice and norms of corrective justice stand to each other in an interesting and important contrast, which Aristotle expressed in vivid mathematical terms. Norms of distributive justice are to be understood on the 'geometric' model of division. There are several potential holders of certain goods or

[16] Where the possible answers include 'all of it' and 'none of it'. I spell this out to avoid a misunderstanding that arose in conversation with Ben Zipursky. Ben thought that, if Jones is convicted and punished for Smith's crime, this is not, on my account, an injustice. Why? Because there is no question of how much punishment Jones, as opposed to Smith, should get. But I say there is such a question. There must be such a question because there is an answer: Jones should get is none of it whereas Smith should get all of it. Jones' punishment, in other words, was misallocated to Smith.

[17] EN 1130^{b}30ff.

[18] This is Rawls' point in *A Theory of Justice* (Cambridge, Mass. 1971), 314-5. Some, taking the point for granted, try to preserve the Aristotelian dichotomy by assimilating retributive justice to corrective justice instead. See e.g. J.P. Day, 'Retributive Punishment', *Mind* 87 (1978), 498.

[19] I replied with a qualified 'yes' in 'The Virtue of Justice and the Character of Law', *Current Legal Problems* 53 (2000), 1.

ills and the question is how to divide the goods or ills up among them.[20] Norms of corrective justice, on the other hand, are to be understood on the 'arithmetic' model of addition and subtraction. Only two potential holders are in play at a time. One of them has gained certain goods or ills from, or lost certain goods or ills to, the other. The question is whether and how the transaction is to be reversed, undone, counteracted. Should we add what has been subtracted, subtract what has been added, or leave things as they are?[21] Of course the result of the addition or subtraction could always still be represented as a division of the spoils: gains are divided 100:0 against the person who gained by the transaction, say, or losses are divided 60:40 in favour of the person who lost by it (imagine that she was contributorily negligent or failed to mitigate her loss). But this representation of the result as a division fails to bring out that the result depended on a special kind of norm designed to tackle a special kind of allocative question.[22] Something has already shifted between the two parties. The question of corrective justice is not the question of whether and to what extent and in what form and on what ground it should now be allocated among them *full stop*, but the question of whether and to what extent and in what form and on what ground it should now be allocated *back* from one party to the other, reversing a transaction that took place between them. A norm of corrective justice is a norm that regulates (by giving a ground for) the reversal of at least some transactions.

[20] EN $1131^{b}12$-15.

[21] EN $1132^{a}1$-6.

[22] Cf. Wojciech Sadurski, 'Social Justice and Legal Justice', *Law and Philosophy* 3 (1984), 329. Sadurski argues (at 334ff) that corrective justice collapses into distributive justice. His argument proceeds mainly by reading 'distributive' broadly to mean 'allocative', and hence to include all of justice. (He also errs by stretching corrective justice in the characteristic Thomist way so that it becomes unrecognizable as corrective: see note 28 below.)

Misinterpretations of this contrast abound. Perhaps the most common misinterpretation in the one which portrays norms of corrective justice as somehow more *personal* than norms of distributive justice. For some this means (a): conformity with norms of corrective justice is a matter of agent-relative concern (I am rationally concerned only with the extent of my own conformity); whereas conformity with norms of distributive justice is a matter of agent-neutral concern (we are each rationally concerned with the extent of everyone's conformity).[23] For others it means (b): a norm of corrective justice only regulates the actions of the person from whom the transfer back is to be made, so only that person can conform or fail to conform with such a norm; whereas a norm of distributive justice regulates the actions of others apart from the person from whom the transfer is to be made (the state, for example, might conform or fail to conform to such a norm by transferring something from me to you).[24] Propositions (a) and (b) had better not be true if 'doing corrective justice' is to be a possible answer to the question 'what is tort law for?' Only if my conformity with a norm of corrective justice can be of concern to people other than me, contrary to (a), can it be of concern to the law. And only if someone other than me can conform or fail to conform with a norm of corrective justice in my case, contrary to (b), can the law be bound by a norm of corrective justice to take something from me and transfer it back to you without my co-operation (e.g. by ordering the attachment of my earnings or bank accounts, or the seizure of my car or house).

We can rescue the law's role in doing corrective justice through these latter enforcement devices if we weaken

[23] Stephen Perry, 'The Mixed Conception of Corrective Justice', *Harvard Journal of Law and Public Policy* 15 (1992), 917 at 919-920.

[24] Coleman, *Risks and Wrongs* (Cambridge 1992), 310-1 and 318. Departing from the usage of most moral philosophers, Coleman labels this the agent-relative/agent-neutral distinction, inviting confusion between (b) and (a).

proposition (b) so that it turns into proposition (c): a norm of corrective justice only regulates the actions of the person from whom the transfer back is to be made *or another person acting on behalf of that person*. And (c) strikes me as true. To explain how corrective justice can be done as between two parties without the co-operation of the party from whom the transfer back is to be made we need to explain the possibility of vicarious agency: how there can be an agent who acts on my behalf, such that on occasions I can be regarded as having conformed to norms of corrective justice even though it was someone else that did the allocating back for me. Explaining this possibility is a tricky task which I will not be undertaking here.[25] My interest here is different. Does proposition (c) mark a difference between corrective justice and distributive justice? I know of no reason to think that it does. Proposition (c) is also true, *mutatis mutandis*, of norms of distributive justice. When the law secures redistribution of wealth or income through taxation, it does so on behalf of those from whom it levies the taxes. It acts as their vicarious agent in securing their conformity – more precisely, in securing that they will count as having conformed - to those norms of distributive justice that apply to them anyway.[26] So norms of distributive justice are neither less nor more personal than norms of corrective justice. Both types of norms call for conformity by the person from whom the allocation is to be made, or by

[25] It is best pursued by thinking first about the role of liability insurance in private law. How can my duties of corrective justice be performed on my behalf by my insurer? Armed with an answer to the question we can begin to see how my duties of corrective justice could also, in default of performance by me or my insurer, be performed on my behalf by my bank or my employer or a bailiff etc, acting with the law's authorization. I have had an initial stab at thinking about what it means to act on behalf of someone in my 'Some Types of Law', in Douglas Edlin (ed), *Common Law Theory* (Cambridge 2007).

[26] The most sustained defence of this view is by G.A. Cohen. For a good start, see his 'If You're an Egalitarian, How Come You're So Rich?', *Journal of Ethics* 4 (2000), 1, especially the critique of Dworkin at 17-19.

someone else acting on that person's behalf. And conformity with both types of norms, we should add, is a matter of agent-neutral concern: be it corrective or be it distributive, an injustice perpetrated by anyone is in principle everyone's business, and anyone at all has reason to help in securing its avoidance (whether by the agent himself or by another person acting on his behalf). Seen in this light, norms of corrective justice are no more personal than norms of distributive justice.

A second and perhaps more pernicious misinterpretation of the contrast between corrective and distributive justice would have it that norms of corrective justice are sensitive to the past (they set 'backward-looking' grounds of allocation) whereas norms of distributive justice look to the future (they set 'forward-looking' grounds of allocation). The mistake here was decisively exposed by Robert Nozick. Nozick established that, on its most familiar interpretation, the everyday norm 'finders keepers' is a norm of distributive justice, not a norm of corrective justice.[27] True, it is a norm for dividing up goods along what Nozick called 'historical' as opposed to 'end-result' lines. It effects a division that is sensitive to the past, viz. to the fact that different people found different goods. But still the norm answers the geometric question of whether and why things should be allocated among people *full stop*, not the arithmetic question of whether and why things should be allocated *back* from one person to another. Couldn't we, under some imaginable circumstances, turn 'finders keepers' into a norm of corrective justice? Couldn't we imagine a world in which, so far as competed-for and assignable goods are concerned, there are no *res nullius* and no *res derelictae*? Everything is already someone's. Every act of finding is therefore an act of taking from another. Under these conditions wouldn't 'finders keepers' become a (negative) norm of corrective justice with the following content:

[27] *Anarchy, State, and Utopia* (New York 1974), 153-5.

'when things are taken from someone else by finding, the transaction between them stands and is not to be reversed'? No it wouldn't. The proposed norm still wouldn't mention any ground for allocating anything back. It would merely deny that a taking is such a ground. Anyone who asserted 'finders keepers' under these conditions would not be asserting the existence of a 'negative' norm of corrective justice, any more than Hart is asserting the existence of a 'negative' norm of retributive justice. There is no such thing. Such a person would merely be denying that there is any corrective justice to be done in the case.

Nozick's observations are also of great value in exposing a third misinterpretation of the contrast between distributive and corrective justice. Since norms of corrective justice regulate bipartite allocations – allocations back from just one party to just one other party at a time – one may easily slip into thinking that all norms that regulate bipartite allocations are norms of corrective justice. Weinrib goes down this road, and he has the Thomistic reconstruction of Aristotle for company.[28] Once again, however, Nozick has exposed the error decisively. As well as 'finders keepers', his norm of justice applicable to *res nullius* and *res derelictae*, Nozick offers a further norm of justice applicable to things that have already been found. Roughly, the norm is 'surrenderers losers'. A second way for things to be justly allocated, he says, is for them to be voluntarily sold or gifted by those who justly acquired them (whether under 'finders keepers' or under 'surrenderers losers' itself). All of this, Nozick rightly points out, belongs to the theory of distributive justice. It is all about allocation *tout court*. 'Surrenders losers' never gives us a ground for allocating anything back. On the contrary: inasmuch as it regulates allocations back, it only ever gives us a ground for *not* allocating back. And there is, as we just saw, no such thing as

[28] *The Idea of Private Law*, above note 9, e.g. at 64-65. See similarly John Finnis's Thomistic reconstruction of corrective justice as 'commutative justice' in *Natural Law and Natural Rights* (Oxford 1981).

a negative norm of corrective justice. In his world, as Nozick points out, the norms of distributive justice 'finders keepers' and 'surrenderers losers' only need to be supplemented by a norm of corrective justice when someone takes what I originally found *without* my having surrendered it. Now the question is: am I morally entitled to have it back? Nozick's own answer was famously 'yes'. If I found something that was nobody's, and then someone else took it from me by finding it again, without my having surrendered it, I am entitled to have it back on the ground that it was taken from me.[29] 'Finders keepers' and 'surrenders losers' were Nozick's main norms of distributive justice; 'takers returners' was his main norm of corrective justice. Yet both 'surrenders losers' and 'takers returners' regulate only bipartite allocations. This is enough to show that what distinguishes a norm of corrective justice is not the mere fact that it regulates bipartite allocations. An interesting implication is that tort law could have the sole end of doing justice between the parties to a tort case without being restricted to doing *corrective* justice between the parties. Justice between the parties might also include an element of (local) distributive justice. This cannot be ruled out by the essentially bipartite character of the case. If it is to be ruled out, it must be ruled out on some other basis.[30]

Nozick's important insights about the difference between norms of corrective justice and norms of distributive justice have been widely ignored. Probably this is because most people doubt whether his favoured norms of justice are sound, or even close to sound. They suspect, in my view rightly, that a 'finders keepers'/'surrenders losers'/'takers returners' world is a world rife with heinous injustices. But this suspicion is irrelevant to the lessons we just learned. It is one question whether a certain norm of justice is a norm of corrective justice or a norm of distributive

[29] *Anarchy, State, and Utopia*, above note 27, 230-1.

[30] I will be discussing whether this should be ruled out in a companion essay entitled 'What is Tort Law For? Part 2: The Place of Distributive Justice'.

justice. It is a completely separate question whether it is a *sound* norm of justice, such that by relying on it and conforming to it we would, all else being equal, be acting justly. The difference between norms of distributive justice and norms of corrective justice lies in the fact that they regulate different subject matters. Norms of distributive justice regulate the allocation of goods among people together with the grounds of such allocations ('division'). Norms of corrective justice regulate the allocation of goods back from one person to another together with the grounds of such allocations back ('addition and subtraction'). But no norm is made sound or unsound simply by virtue of what it regulates. To be a sound norm it also has to do a *good job* of regulating whatever it regulates. There needs to be an adequate case for regulating that subject matter by that norm.

You may be tempted to say in response that norms of justice are sound by definition. But that is a subtle distortion of the truth. It is true that whatever is just is to that extent and in that respect analytically worth pursuing. It is admittedly contradictory to say: That solution is just but it has nothing going for it, morally speaking.[31] But this is because a solution is just if and only if it is in conformity with a sound norm of justice. If it is in conformity with a norm of justice, but the norm is unsound (like 'finders keepers'), then it is not a just solution. So norms of justice are not analytically sound. 'Sound norm of justice' is no tautology; 'unsound norm of justice' is no oxymoron.

This brings us to our first doubt about 'corrective justice' as an answer to the question 'what is tort law for?' Possibly, to provide an adequate account of what tort law is for, one needs to invoke a norm of corrective justice. But that can only be the first step. The next step has to be to show what the norm of corrective justice that one invoked has going for it. One should

[31] Cf Matthew Kramer, 'Justice as Constancy', *Law and Philosophy* 16 (1997), 561 who denies (e.g. at 569) that unjust acts are analytically objectionable.

not imagine that this task is restricted to showing what this norm has going for it as compared with other norms of corrective justice. One also needs to be aware that possibly no norms of corrective justice are sound. Perhaps the only sound norms of justice are norms of distributive justice. Perhaps the just person is one who approaches every allocative problem as if no transactions have ever taken place and hence everything is still available for first allocation. This is more radical than the familiar proposal (yielding a perennial sophomoric objection to tort law) that it cannot be correctively just to give back to the original holder what the original holder did not justly hold before the transaction that is being reversed. That proposal invokes no norm of corrective justice, for it does not give any ground for allocating anything back. It merely sets a necessary condition for any norm of corrective justice to meet before it can be sound, and hence a sufficient condition for such a norm to be unsound. The more radical suggestion before us now is that every single norm of corrective justice is unsound, never mind what extra conditions it meets. Everything that is up for allocation – including the losses that are at stake in a tort case - should be regarded as *res nullius* or *res derelictae*, and should be allocated as if for the first time. True, this would be a surprising conclusion, but still one needs to show what exactly would be wrong with it. So one cannot satisfy oneself with answering the question 'what is tort law for?' simply by citing a norm of corrective justice. One has to go on to the next step of explaining what this norm of corrective justice itself is for, what the norm has going for it, what makes it sound. And 'corrective justice' clearly cannot be the answer to this further question. Why not? Because 'corrective justice' still just names a type of norm distinguished by the subject-matter that it regulates. We have still not been told what case there is for having or conforming to any such norm, what makes any norm of corrective justice sound.

So far, this is just another way of saying that 'corrective justice' is a studiously noncommittal answer to the question

'what is tort law for?' It leaves open whether the law of torts is worth retaining, and merely tells us that *if* the law of torts is worth retaining, that is at least partly because it lives up to some norm of corrective justice that is worth living up to. But possibly our doubt about 'corrective justice' as an answer to the question 'what is tort law for?' can be deepened. On closer inspection, it may seem that the answer 'corrective justice' can't even take us the first step in understanding what tort law is for. Once we see that norms of corrective justice are differentiated from other norms only by what they regulate, we see that some legal norms are themselves norms of corrective justice. The norm of tort law according to which (legally recognized) wrongdoers are required to pay reparative damages in respect of those (legally recognized) losses that they wrongfully occasion,[32] on the ground that they wrongfully occasioned those losses, is one such. It is a norm by which some people are to get back at least some of what they lost from the person at whose hands they lost it. As Coleman himself says: 'These features of tort law are plain to anyone without the benefit of theory.'[33] So when people ask 'what is tort law for?', they are already asking, by necessary implication, what the legal norm of corrective justice itself is for. That norm is part of the law, 'plain to anyone'. Corrective justice, in other words, is part of the thing that needs to be rationally explained, part of the *explanandum*. So how can Coleman, or anyone else, think that it is (even the beginning of) the rational explanation?

[32] I say 'occasion' rather than 'cause' to accommodate the huge late-twentieth century extension of personal (as opposed to vicarious) tort liability that was heralded by *Dorset Yacht Co.* v *Home Office* [1970] AC 1004. I tend to think this was a wrong turning in the law – that *Dorset Yacht* should have been treated as a vicarious liability case – but the argument is irrelevant here.

[33] *The Practice of Principle*, above note 2, 21.

The most powerful version of this critique is owed to Richard Posner.[34] A 'corrective justice' account of tort law cannot conceivably be a rival, Posner argues, to an economic analysis of tort law. To cite corrective justice is merely to remind us of one thing that has to be justified when we justify tort law. It does nothing to actually justify it. An economic analysis, by contrast, makes some effort to justify this feature of tort law. It has a go at showing what tort law's norm of corrective justice might have going for it. As Posner puts the point:

> Economic analysis supplies a reason why the duty to rectify wrongs, and the corollary principle of distributive neutrality in rectification, is (depending on the cost of rectification) a part of the concept of justice. Corrective justice is an instrument for maximizing wealth, and in the normative economic theory of the state – or at least in that version of the theory that I espouse – wealth maximization is the ultimate objective of the just state.[35]

So the problem with 'corrective justice', for Posner, is not that it supplies only the beginning of an answer to the question 'what is tort law for?' The problem is that it is merely a restatement of the question, because tort law is (on any sensible view, including the economic view) partly constituted by the legal norm of corrective justice that awards reparative damages against tortfeasors in the wake of their torts. The real question, with which economic analysts grapple heroically, but their 'corrective justice' opponents seem curiously reluctant even to mention, is: What is tort law's norm of corrective justice for? What does it have going for it? The answer espoused by Posner himself may be asinine, the typical answer of one who knows the price of everything and the value of nothing. But at least it is an answer. Whereas 'corrective justice', as it stands, is no answer at all.

[34] 'The Concept of Corrective Justice in Recent Theories of Tort Law', *Journal of Legal Studies* 10 (1981), 187.
[35] Ibid, 206.

3. Corrective justice as an instrument of corrective justice

Posner's critique goes too far. It is true that tort law already includes a norm of corrective justice, the norm according to which (legally recognized) wrongdoers are required to pay reparative damages in respect of those (legally recognized) losses that they wrongfully occasion, on the ground that they wrongfully occasioned them. But a possible view is that, in accounting for this legal norm of corrective justice, one must rely on a further norm of corrective justice the force of which is not merely legal, i.e. a *moral* norm of corrective justice. One must rely, perhaps, on a counterpart moral norm whereby wrongdoers are morally required to pay reparative damages in respect of those losses that they wrongfully occasion. Such a moral norm is what many writers seem to have in mind when they offer 'corrective justice' as an answer to the question 'what is tort law for?' Of course in giving this answer these writers haven't yet got very far. As I just made clear, they still have to explain what their moral norm of corrective justice, in turn, is for – what it has going for it. But nor are they simply standing still, as Posner's critique suggests. They have made a preliminary move. They have mentioned something other than the *explanandum*. The *explanandum* is a legal norm of corrective justice; the proposed rational explanation begins, although it obviously can't end, with a counterpart moral norm of corrective justice.

How exactly could these two norms of corrective justice be related, such that the moral one needs to be relied upon in explaining the legal one? Weinrib and Coleman both argue that it must be understood as a constitutive relationship. The legal norm of corrective justice serves its moral counterpart by giving shape to it, by determining at least some of its applications. Weinrib's version of this thesis is more ambitious than Coleman's. Weinrib thinks that the counterpart moral norm of corrective justice is owed entirely to the law. Morality would not contain a norm of reparation for wrongfully occasioned losses at

all were there no law giving shape to it. '[W]here practical reason formulates ethical duties,' says Weinrib, 'juridical ones have already taken hold.'[36] Coleman's claim is more modest. Morality would have a norm of reparation for wrongfully occasioned losses only in a relatively indeterminate form were it not for tort law's constitutive intervention. Social practices like tort law, for Coleman, 'turn abstract ideals into regulative principles; they turn virtue to duty.'[37] There is a significant disagreement here. The disagreement is small, however, when compared with what is agreed. Weinrib and Coleman agree that, in explaining what tort law is for, one must resist the instrumental overtone of the question, much trumpeted by legal economists. In its tackling of allocative moral questions, one must think of tort law as performing a constitutive as opposed to an instrumental role. Tort law's way of contributing to a sound moral solution to such questions is by being a component part of the solution, not by helping to make the attainment of the solution more probable or more 'efficient'. This is the core of their broader objection to 'functionalism', their resistance to thinking of tort law as the servant, whether instrumentally or otherwise, of any end that can be specified independently of tort law's contribution to it.[38]

Here begins a second doubt about 'corrective justice' as an answer to the question 'what is tort law for?' Suppose we grant Weinrib and Coleman their point that, thanks to the corrective justice norm of tort law, people often have moral obligations of reparation different from (because more determinate than) those that they would have without tort law's intervention. Let's allow, in other words, that tort law often helps to constitute the correctively just solution. What doesn't follow is that tort law's

[36] *The Idea of Private Law*, above note 1, 110.

[37] *The Practice of Principle*, above note 2, 54.

[38] Tort law could be an expression of some attitude or ideology, which would give it an external end that it serves non-instrumentally. See Gardner 'The Purity and Priority of Private Law', above note 4, at 459–60.

norm of corrective justice should not be evaluated as an instrument. On the contrary, to fulfill its morally constitutive role, tort law's norm of corrective justice *must* be evaluated as an instrument. It must be evaluated as an instrument of improved conformity with the very moral norm that it helps to constitute. To see why, think about some other laws that are supposed to lend more determinacy to counterpart moral norms.

Quite apart from the law, for example, one has a moral obligation not to drive one's car dangerously. The law attempts to make this obligation more determinate by, for example, setting up traffic lights, road markings, and speed limits. If the law does this with sound judgment, the proper application of the relevant moral norm is changed in the process. A manoeuvre that would not count as dangerous driving apart from the legal force of the lane markings at the mouth of the Lincoln Tunnel may well count as dangerous driving – and hence a breach of the moral norm forbidding dangerous driving – once the lane markings are in place. But this holds only if the law proceeds with sound judgment. It holds only if relying on the lane markings assists those who rely on them to avoid violating the original moral norm. If the mouth of the Lincoln Tunnel has profoundly confusing lane markings, reliance on which only serves to make road accidents more likely, failing to observe the lane markings is not a legally constituted way of driving dangerously. It is not immoral under the 'dangerous driving' heading. That is because, if the lane markings are profoundly confusing, driving according to the lane markings does not and would not help to reduce the incidence of dangerous driving.

The lesson of the case is simple. A legal norm cannot play its partly constitutive role in relation to a moral norm unless it also has some instrumental role to play in relation to the same moral norm, unless conformity with the legal norm would help to secure conformity with the moral norm of which the legal norm is supposed to be partly constitutive. This formulation deliberately leaves open the question of how much help the law

has to give before it can be morally constitutive. Does it need to be helpful only in this case, or in all possible cases, or in most actual cases, etc.? And when it is helpful, does it need to be helpful on balance - more of a help than a hindrance – or will helpfulness in some small respect, readily outweighed, suffice? And help relative to what baseline? Does it need to be an instrument of better action than there would be in a world without any law, or only a better action than there would be in a world without this particular law? If without this particular law, then with what law instead, if any? These questions (and others like them) are important in fine-tuning the thesis that the law's morally constitutive role depends on its morally instrumental role. But all these questions presuppose that the thesis is true, that when people's doing what they are legally bound to do would not help people to do what they are morally bound to do, the law by which they are legally bound does not help to determine – and hence to constitute - what they are morally bound to do.

The case of the confusing lane markings at the mouth of the Lincoln Tunnel is a case of a directly self-defeating legal norm. The law fails as an instrument of its own moral purpose even though (and perhaps even because) people conform to it. In other cases, legal norms are indirectly self-defeating.[39] The law would be a successful instrument of its own moral purpose if only it were conformed to; but it fails as an instrument of its own moral purpose because it sets up perverse incentives that tend to encourage people to violate it. Many critics think that criminal laws prohibiting drug dealing tend to exhibit this failing. The illegality of drug dealing forces it underground where excesses cannot be checked and potential profit is very high. The net result, some claim, is more drug dealing and morally worse drug dealing than would go on if such activities were decriminalized.

[39] On the two types of self-defeatingness, see Derek Parfit, *Reasons and Persons* (Oxford 1984), chs 1-4.

In such a case, unlike the case of the road markings, it is possible that the law does have a constitutive effect on the moral norm that it seeks to serve. Possibly some acts that would not be morally wrong but for such a law are made morally wrong by it. But it still does not follow that the legal norm escapes further instrumental scrutiny. It is not enough to say, in defence of the law, that drug dealing is morally wrong and that is what the law (with its morally constitutive extra determinacy) prohibits. The question must also be asked whether the law that prohibits drug dealing actually helps to reduce the incidence of drug dealing. If not, it is a failure in its own terms. Never mind that it would be a morally impeccable law if only people would comply with it. It is an indirectly self-defeating law because it encourages people not to comply with it. It retards rather than advances the cause of conformity with the very moral norms that it helps to constitute. All else being equal (i.e. in the absence of any other good consequences) it should be removed from the statute book.

No legal norm is exempt from this kind of instrumental scrutiny. Tort law's norm of corrective justice must be subjected to it too. We need to ask: Does this norm advance the cause of conformity with the moral norm of corrective justice that, according to Weinrib and Coleman, it helps to constitute? If not then one cannot make a good case for the legal norm by relying on the moral norm. Giving the answer 'corrective justice' to the question 'what is tort law for?' therefore does not exempt one from showing that the law is instrumentally sound. Nor, therefore, does it exempt one from answering the empirical questions associated with its instrumental justification. Is it the case that the more one legally requires of people that they pay reparative damages for their wrongs, the more they do so? Or is there a point at which the law becomes self-defeating, a point at which diminishing returns turn into negative returns? And if the law is self-defeating, is this because, even when people do what the law requires in the name of corrective justice, less corrective justice is done; or is it because the law is encouraging its own

violation, with the consequence that less corrective justice is done? Is the law, in other words, directly or indirectly self-defeating? Notice that these are not just any old empirical questions about the law's instrumentality. We are bracketing out other consequences that tort law's norm of corrective justice may have apart from its consequences for conformity with the moral norm of corrective justice that it is supposed to help to constitute. We are querying its efficiency only relative to that moral norm. But still we are querying its efficiency. There is no possible way of looking at tort law that escapes the question of its efficiency. It follows that 'corrective justice' as an answer to the question 'what is tort law for?' cannot be, as Weinrib and Coleman like to think, an answer that *rivals* 'efficiency'. The answer 'corrective justice' tells us, rather, what it is that the law of torts is supposed to be efficient *at*. It is supposed to be efficient at securing that people conform to a certain (partly legally constituted) moral norm of corrective justice. If it is not efficient at this job then, from the point of view of corrective justice itself, the law of torts should be abolished forthwith.

4. Prevention before correction?

Tort law's norm of corrective justice and its counterpart moral norm both regulate the reversal of wrongful transactions on the ground of their wrongfulness. The transaction was wrongful and that is why, in tort law, it calls for correction. The same is true in the law relating to breach of contract: a breach of contract is a wrong and that is why, according to contract law, correction is in order. This is a feature shared by many but not all norms of corrective justice. Sometimes, as in the law of unjust enrichment, a transaction need not be wrongful in order to call for correction. In such cases the only relevant wrong is that of failing to correct the transaction, or perhaps (differently) that of transacting

without correcting.[40] In the law of unjust enrichment there need be no prior wrong that explains why the correction is called for. Nevertheless correction is called for and the norm that regulates the correction is a norm of corrective justice.[41]

This distinction between corrective justice in tort law and corrective justice in the law of unjust enrichment already hints at another worry about 'corrective justice' as an answer to the question 'what is tort law for?' In tort law, unlike the law of unjust enrichment, there are prior wrongs that call for correction. Surely tort law has some institutional responsibility in relation to these prior wrongs other than that of helping to correct them? As well as helping to secure that people conform to a certain (legally recognized and partly legally constituted) moral norm of corrective justice, isn't there a necessary role for tort law in securing that people don't commit certain (legally recognized and partly legally constituted) wrongs in the first place, so that there is less for tort law to correct? Wouldn't it be better, even from the perspective of tort law itself, if there were *less* correcting to do thanks to the fact that fewer legally recognized wrongs, fewer torts, had been committed? So wouldn't we more naturally think of 'corrective justice' as only a secondary *raison d'être* of tort law, and only a secondary answer to the question of what tort law is for, a 'secondary provision[ ] for a breakdown in case the primary intended peremptory reasons are not accepted as such'?[42]

[40] Bob Goodin mistakenly assimilates the law of torts to this model when h e writes that, in tort law, 'compensation serves to right *what would otherwise count as* wrongful injuries.' Robert E. Goodin, 'Theories of Compensation', *Oxford Journal of Legal Studies* 9 (1989), 56 (emphasis added).

[41] Coleman denies this, dividing the 'restitutionary justice' of unjust enrichment from the truly corrective justice of tort law: *Risks and Wrongs*, above note 24, at 371. Weinrib, by contract, joins me in regarding both tort law and the law of unjust enrichment as sites for the doing of corrective justice: *The Idea of Private Law*, above note 1, 140-1.

[42] The words are H.L.A. Hart's, from 'Commands and Authoritative Legal Reasons' in his *Essays on Bentham* (Oxford 1982), 254.

Tort law, you might think, is first and foremost there to assist in the constitution of various moral norms bearing on how we should transact with each other, and in helping to see to it that we do indeed transact with each other in conformity with these moral norms. Only where that fails, you might think, does tort law need to fall back on its norm of corrective justice as a way of shifting the losses associated with the wrongful transaction back where they came from. The need to resort to a norm of corrective justice, in short, represents a partial failure for tort law, even in its own terms.

Weinrib tries to anticipate and avoid this line of criticism by suggesting that the prior wrongs – the torts themselves – are also violations of norms of corrective justice. In his words, 'corrective justice serves a normative function: a transaction is required, on pain of rectification, to conform to its contours.'[43] In tort law, in other words, corrective justice is only ever called upon to rectify a prior corrective injustice. But this is a non-starter. Most torts are not injustices at all, let alone corrective injustices. They are violations of norms of honesty, considerateness, trustworthiness, loyalty, humanity, and so on.[44] True, one could commit a tort of conversion that consists in a wrongful failure to return an object not wrongfully acquired. In this case the tort which tort law corrects is indeed a prior corrective injustice, a wrongful failure, under the law of unjust enrichment, to return goods that had not been wrongfully acquired. But it is hard to see how a tort of nuisance, defamation, inducing breach of contract, or trespass to land could ever be a corrective injustice. The only corrective

[43] *The Idea of Private Law*, above note 9, 76. Again Coleman contents himself with a more modest proposal, viz. that corrective justice 'imposes constraints on what [the torts themselves] can be': *The Practice of Principle*, above note 2, 34. Coleman's proposal is sound but does not help to answer the objection currently under consideration.

[44] For searching discussion, see Hanoch Sheinman, 'The First Virtue of the Law Courts and the First Virtue of the Law', *Legal Theory* 13 (2007), 101.

injustice, where these torts are concerned, comes later when one fails to pay the reparative damages for their commission.

But isn't Weinrib here overlooking a much more obvious answer to the criticism that corrective justice is at best a second best to the prevention of the torts themselves? The law of torts clearly does seek to reduce the commission of torts. And it clearly does so, above all, by using its norm of corrective justice. By use of this norm it transfers some losses associated with the commission of torts onto those who committed them, thereby at least partly restoring those who suffered those losses to the position they would have been in had the tort not been committed. As well as correcting torts that have already been committed, this practice is apt systematically to deter the commission of torts that have not yet been committed. Even a casual observer cannot but see the dramatic effects of this strategy in controlling the behaviour of potential tortfeasors today. Many public bodies and corporations have become almost pathologically fixated with not committing torts, mainly because of the potential legal consequences of doing so, including but not limited to potentially vast liabilities to pay reparative damages to those whom they wrong. There is of course empirical research to be done on how well-targeted this deterrence is. Experience suggests that tort law deters many acts that are not tortious as well as many that are (the so-called 'chilling effect').[45] But this does not detract from the plausibility of the hypothesis that tort law's norm of corrective justice does a great deal to deter the commission of torts. This is what gives economic analysts of law the confidence that, even without empirical research, they can explain tort law's norm of corrective justice without invoking

[45] The 'chilling effect' is most often mentioned in connection with the inhibition of free speech, e.g. by the tort of libel. But the problem is a broader one that afflicts tort law in general, and tort law in particular. For analysis, see Frederick Schauer, 'Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"', *Boston University Law Review* 58 (1978), 685.

any counterpart moral norm of corrective justice. On their view tort law's norm of corrective justice is mainly a deterrent device directed at potential tortfeasors. Its success in securing that actual tortfeasors bear the losses they have already wrongfully occasioned – its corrective success - is important mainly as a means of securing that, in future, fewer torts are committed, with the result that there will be fewer occasions, in future, for actual tortfeasors to bear the losses they wrongfully occasioned. The point of the legal norm of corrective justice is, in short, to have less need for the legal norm of corrective justice.

Now we can see that Weinrib wasn't overlooking this much more obvious answer so much as trying to preempt it. For it leads straight back to Posner's harsh criticism of 'corrective justice' as an answer to the question 'what is tort law for?' It purports to explain tort law's norm of corrective justice without mentioning any further norm of corrective justice that tort law's norm of corrective justice might exist to serve. So it leaves 'corrective justice' to play a role in tort law only as part of the *explanandum*, not as part of the explanation.

As I said before, this attack goes too far. Without a doubt the role of tort law's norm of corrective justice in deterring future torts is a morally important role. It is part of the point of tort law's indigenous norm of corrective justice. So it is part of what tort law is for. If Coleman and Weinrib deny this they are plainly mistaken. But if Coleman and Weinrib merely claim – as I suggested they should claim - that this deterrence story cannot be the *whole* story of what tort law is for, then they are spot on. The moral norm of corrective justice cannot so easily be sidelined. Why? Coleman and Weinrib are looking in the right direction when they stress the morally constitutive role of law. When legal norms regulate some activity, and conforming to the legal norms would help one to conform to the moral norms that regulate that activity, then the legal norms *necessarily* provide extra content to the moral norms. Well-judged and well-observed road markings cannot but change what counts as dangerous driving, and hence

what is prohibited by the moral norm prohibiting dangerous driving. Such constitution and reconstitution of counterpart moral norms is an unavoidable by-product of sound law-making. It follows that the law of torts cannot include a sound norm of corrective justice without there also being a moral norm of corrective justice that the legal norm of corrective justice helps to constitute. And once there is such a moral norm of corrective justice, the law of torts cannot be justified without pointing to the role that the law of torts plays in securing conformity with that very same moral norm. So the question of how the legal norm is justified inevitably leads to the question of how the moral norm is justified. If one cannot justify the moral norm whereby wrongdoers pay reparation for their wrongs, one also cannot justify its legal counterpart. So the task remains of explaining what this moral norm of corrective justice is for, such that there is a moral case for the law to serve it.

You may object that there is no question of how a moral norm is to be justified. It is part of the nature of a moral norm that, if it exists, it is a sound norm. This is one important way in which moral norms differ from legal ones. Unjustified legal norms are still legal norms; they still bind in the eyes of the law. Unjustified moral norms, by contrast, are no more than putative moral norms, supposed moral norms, would-be moral norms. They do not bind anyone morally. They are not moral norms but only what people mistakenly take to be moral norms. So if we have already concluded that the moral norm whereby wrongdoers must pay reparation for their wrongs exists, we must have concluded that it is a sound norm. I reply: That much is true. But on closer inspection we have not yet established that the moral norm whereby wrongdoers must pay reparation for their wrongs exists. We have only established that, *if* there is such a moral norm, and *if* the law of torts is not directly self-defeating in the contribution it makes to conformity with that moral norm, *then* the law of torts helps to constitute (determine the application of) that moral norm, and *thus* the moral norm must be invoked

(and its soundness relied upon) in defending the law of torts. We still need to decide whether the moral norm is sound in order to decide whether it exists. For as the imaginary objector rightly points out, there is no such thing as an unsound moral norm. Unless it is sound it is only a supposed moral norm and it is incapable of lending moral justification to anything.

So what – we finally get to ask - makes this moral norm of corrective justice a sound one? Couldn't it be that the prevention of wrongs (or a similar 'external' goal) comes back in here as the main case for having the *moral* norm of corrective justice? I have explored this proposal and its limitations in detail elsewhere.[46] In the end it is unsatisfying. It works only when several artificial assumptions are made. The most important is the assumption that the moral norm of corrective justice is also a *social* norm, i.e. a norm that is widely used. It must be widely used before people in general can be deterred from wrongdoing by the prospect of its use. This has a curious implication. It has the implication that, all else being equal, the less people use the norm in question, the less case there is for them to use it. Collectively, we can release ourselves from the norm by ignoring it. It may be said that this implication is inconsistent with the very idea of a moral norm. Isn't it built into the idea of a moral norm that it binds us irrespective of whether anyone's behaviour conforms to it, irrespective of whether anyone uses it, indeed irrespective of whether anyone is even aware of its existence?[47] Certainly this can be an overtone of the word 'moral' in some contexts. In this sense moral norms are to be contrasted with 'mere' social norms, understood as norms that bind us only inasmuch as they are in social use. But we need not insist on this stark contrast here. All

[46] In 'Backwards and Forwards with Tort Law', in Michael O'Rourke and Joseph Keim-Campbell (eds), *Law and Social Justice* (Cambridge, Mass 2005).

[47] This is the special feature of morality, or at any rate of the morality of justice, championed by G.A. Cohen in his *Rescuing Justice and Equality* (Cambridge, Mass. 2008), part II.

we need insist upon here are two more modest proposals: (1) that at least some moral norms are binding irrespective of the extent to which they are in social use; and (2) that a satisfying defence of the moral norm whereby wrongdoers owe reparation for their wrongs will be a defence that puts it in this class of use-independent moral norms. It is proposal (2) that makes the wrong-prevention defence of the moral norm so unsatisfying.

Unsatisfying perhaps. But what more satisfying alternative is on the table? Remember that the question at this stage has become: What could any norm of corrective justice, even a moral one, possibly be for? What could possibly be its *telos*, its rationale, an intelligible case for its existence? 'The prevention of the very wrongs that the norm would have us correct' may be a terrible answer, but it is at least an answer. Whereas 'corrective justice', as I have shown, is at this point in the investigation no answer at all. It is true but explanatorily vacuous to say that the *telos* of a moral norm of corrective justice is corrective justice. It can only mean something like: Every sound norm of corrective justice is such that, by conforming to it, we make our actions in one respect, namely in a corrective respect, just. We still need to know what could possibly make such a norm sound.

5. The continuity of the corrective

The 'prevention' rationale for norms of corrective justice is unsatisfying. Yet our exploration of it – especially of the idea that doing corrective justice in the wake of a tort is at best a second best to the prevention of the tort itself – also points us in a new and more promising direction. It draws our attention back to the tort itself, the wrong that calls for correction. Up to now we may have been tempted to think of norms of corrective justice as calling for a rationale that is specific to norms of corrective justice. In looking for this special 'corrective justice' rationale, it may seem, we need - we can - no longer be much interested in the norm that was violated in committing the original wrong.

Pace Weinrib, it was not typically a norm of justice at all, never mind a norm of corrective justice. Of course, we cannot but be interested in it in one respect. The obligation of reparation is grounded in (comes into existence on condition of and by reason of) this other norm's violation. That is our corrective justice interest in it. Yet as we gain that interest in it, we lose interest in it in another way. We lose interest in it for its own normative content and force. It is no use to us now as a source of guidance about what to do. The clock cannot literally be turned back so that violation is replaced by conformity. It is too now late for conformity. So isn't it also too late to worry – to worry rationally - about what the original norm required us to do?

Not necessarily. Consider this example devised by Neil MacCormick.[48] I promise to take my children to the beach today, but an emergency intervenes and I renege on the deal. Let's say I was amply justified in doing so. One of my students, let's say, was in some kind of serious and urgent trouble from which only I could extricate him, and only by devoting most of the day to it. In spite of this ample justification for letting the children down today I am now bound, without having to make a further promise, to take them to the beach at the next suitable opportunity (if there is one). Suppose a suitable opportunity is tomorrow. Am I bound to take them to the beach tomorrow for reasons that are entirely different from the reasons that I had to take them to the beach today? Surely not. Why me? Why the children? Why the beach? Why tomorrow? Clearly there is some sense in which my broken promise continues to exert a hold over me after I break it, a sense in which it continues to shape what I am bound to do. Of course, it is too late for me to keep my promise perfectly. I promised to take the children to the

[48] 'The Obligation of Reparation' in MacCormick, *Legal Right and Social Democracy* (Oxford 1982), 212. MacCormick is unfortunately distracted by special features of the example – particularly that the breaking of the promise was justified - and is drawn to conclusions somewhat at odds with mine.

beach today and today is gone. But is it also too late for some kind of *im*perfect performance? I can't make it today, but I can still take them the beach some time, and if it can't be today, well tomorrow is close, and the closer to perfect performance of my promise, you might think, the better. There is an element of continuity here, something that carries through from my original obligation into my obligation now. Was the former discharged (i.e. put to an end) by its breach? Perhaps not entirely. It seems to leave some traces of itself, some echo, behind for later.

By contrasting perfect and imperfect performances, I have already raised one candidate explanation. Perhaps the later obligation is the very same obligation as the earlier one, an obligation remaining in place after violation, awaiting whatever residual performance is still feasible? Perhaps, in other words, there is one norm (the norm created by the promise to the children), with which there can be partial as well as complete conformity? This alluring idea quickly runs into grave problems of its own. It is not for nothing that contract and tort lawyers often speak of the obligation of reparation as a 'secondary obligation' which arises out of breach of a 'primary obligation' (meaning a breach of contract or tort).[49] This way of talking and thinking reflects the fact that obligations (and more generally norms) are individuated according to the action that they make obligatory (or, in the case of other norms, empower or permit).[50]

[49] e.g. *Photo Production Ltd* v *Securicor Transport Ltd* [1980] AC 827 per Lord Diplock at 850. On a more sceptical note, at least in respect of torts, Peter Birks, 'Definition and Division: A Meditation on *Institutes 3.13*' in Birks (ed), *The Classification of Obligations* (Oxford 1997).

[50] This should not be read as a denial of the existence of so-called 'imperfect obligations', here meaning those which leave the obligation-holder with discretion as to the mode of performance. These too are individuated according to the action that they make obligatory. I have an obligation to meet the children out of school. Shall I go by bus or by bicycle? Either way it is the action of meeting the children out of school that is obligatory. The example helps us to see that all obligations are (more or less) imperfect in the

Where a new action becomes obligatory only if and because another obligatory action was not taken, then what we have necessarily qualifies as a new obligation, viz. a new one that is grounded in breach of the old one. So when there is talk – as there sometimes is in contract law – of 'partial' or 'substantial' performance – this cannot be interpreted to mean that particular obligations in a contract have been imperfectly performed. It must be interpreted to mean, rather, that some of the obligations in a contract were performed, and others were not performed, with the implication that *the contract as a whole* – understood as a set of obligations - was imperfectly performed.[51]

And yet there can clearly be graver and less grave breaches of the same contractual term, more and less egregious commissions of the same tort, and generally more and less significant breaches of one and the same obligation. How are we to make sense of these ideas, if they can't be explained in terms of partial performance? One may be tempted to think that the crucial distinction here is between legal and moral assessment: that legally there is either a violation or not, whereas morally it may be appraised as more or less significant. But this is not the distinction we need here. Our remarks about the individuation of obligations apply equally in the bare moral case of the children and their abandoned trip to the beach. Here too, without a legal issue in sight, the obligation to go too the beach on the next suitable occasion is a different obligation, because it calls for a different action, from the original obligation to go to the beach today. The performance of the second obligation is not part-performance of the first. And yet the violation of the first

relevant sense. I have an obligation to lock the door at 7pm precisely. Shall I do it with my left hand or my right hand? Quickly or slowly? While humming *La Marseillaise* or not? For a fuller argument, see George Rainbolt, 'Perfect and Imperfect Obligations', *Philosophical Studies* 98 (2000), 233.

[51] So substantial performance is only possible, in the common law of contract, when a contract is 'severable': *Hoenig v Isaacs* [1952] 2 All ER 176.

obligation is to some extent mitigated – rendered less morally troubling – by the performance of the second. How?

The answer is that while an obligation is either performed or not performed, those reasons in favour of the action that contribute to its obligatoriness can each be conformed to more or less perfectly. This proposition leads us, eventually, to an understanding of what corrective justice is for. But before we get to that point, the proposition needs some unpacking.

An obligation is not a reason, but the fact that one has an obligation is a reason – a reason of special force[52] - for doing whatever one has an obligation to do. However, it is not only a reason for doing that very thing. Reasons are individuated differently from obligations. Every reason for action is potentially a reason for multiple actions. This is true even of the fact that one has an obligation, understood as a reason for action. Suppose that I have an obligation to pay for my bus journey before I make it. I perform this obligation if and only if I pay for my bus journey before I make it. And the fact that I have this obligation is a reason to do exactly that. A reason, as I said, of special force. Yet the fact that I have this obligation is also a reason for me to do various other things short of performing it, assuming that I intend to take the bus. It is a reason to keep some loose change in my pocket, to hunt in my pocket for my loose change when I get to the bus stop, to state my destination clearly to the driver or else to tender what I already know to be the correct fare, and so forth. None of these is itself an obligatory action. Yet the fact that I have an obligation to pay in advance for my bus journey is a reason for each of these actions. The reason – the fact that I

[52] I endorse Joseph Raz's view according to which the fact that one has an obligation to ϕ is a protected reason to ϕ, meaning a reason to ϕ that is also a reason not to act for at least some reasons not to ϕ. Raz, 'Promises and Obligations' in P.M.S. Hacker and J. Raz (eds), *Law, Morality, and Society* (Oxford 1977). (The fact that I have an obligation to ϕ is also a categorical reason to ϕ but that feature affects its scope, not its force.)

have the obligation – counts in favour of these further actions because these further actions contribute instrumentally to my performing the obligation (by, for example, enabling, facilitating, or encouraging me to do it). Other actions, we may note, contribute constitutively rather than instrumentally to my doing so. For example, I contribute constitutively to performing my obligation if, lacking the money to pay my fare upfront, I don't take the bus at all. Likewise if, having paid too little, I get off at the earlier stop to which the fare I have paid would take me, and walk the rest. Again neither of these actions is itself obligatory (imagine that there are other possibilities, such as borrowing the excess fare from another passenger before continuing)[53] and yet the fact that I have the obligation remains a reason to do these things because they contribute to my performing it.

But what if, perhaps owing to a confusion between myself and the driver, I do end up making a journey beyond the one I paid for at the start? My original obligation is, we should now be able to agree, discharged (put to an end) by its breach. *Ex hypothesi* it was an obligation to pay upfront and now it is too late for me to pay upfront. Consequently, the fact of my having the obligation has also lost its ability to serve as a reason for my doing, or anyone's doing, any of the things that remain available to be done.[54] Not only is it too late for me to perform my obligation; it is also too late, by necessary implication, for any of

[53] I include this caveat because one may think that it is derivatively obligatory to do whatever is both necessary and sufficient to do whatever one already has an obligation to do. To rule out an obligation derived in this way, I am ruling the sufficient acts in the example to be unnecessary. For the problem, if not the solution, see A.J. Kenny, 'Practical Inference', *Analysis* 26 (1966), 65.

[54] I should perhaps say 'an operative reason for action' because it may still serve in the minor or auxiliary premises of a practical syllogism. It may also, of course, serve as a presupposition of another operative reason for action. For example, that I breached an obligation (an operative reason for action after my breach) presupposes that I had an obligation. In such a case I might report just part of the now-operative reason by saying 'But I had an obligation!'

my actions, or indeed anyone else's actions, to contribute instrumentally or constitutively to my performing my obligation. And yet, all else being equal, I clearly still have an obligation to pay, which is now an obligation to pay in arrears rather than to pay in advance for the journey. Why? The new obligation exists because, quite apart from the now non-conformable reason that was the fact of my having an obligation to pay upfront, there are further reasons *why* I had an obligation to pay upfront that are not necessarily non-conformable. I still conform, at least in part, to at least some of these further reasons if I pay in arrears. One such reason, let's suppose, is that my having (in common with all other bus passengers) this obligation to pay upfront helps to see to it that the bus company gets paid for the services it provides, and hence is enabled or encouraged to provide them. I can still help to advance this aim – and hence at least partly conform to this reason – if I pay for the journey later, either by presenting the extra money to the driver at the end of my journey, or by sending it to the bus company once I get home. Naturally, other reasons may countervail. (Such a lot of paperwork for such a tiny sum! I will only get the driver into trouble!) The reason to pay up only counts for as much as it counts for. My point is that, still being available for conformity, it counts for something.

Similarly, the avoidance of my children's disappointment may figure in the rationale of an obligation that I owe them. If I breach the obligation, let us suppose, I will not be able to avoid their disappointment altogether. But I can still do something to curtail their disappointment. My reason not to have disappointed them full stop is also a reason to minimize their disappointment if I cannot but disappoint them. Reasons, unlike obligations, allow for imperfect conformity. Since we can't go to the beach today, how about tomorrow? Or the next sunny day? Or, if there's no sunny day soon, how about the ice rink instead?

To generalize: Once the time for performance of a primary obligation is past, so that it can no longer be performed, one can often nevertheless still contribute to satisfaction of some or all of

the reasons that added up to make the action obligatory. Those reasons, not having been satisfied by performance of the primary obligation, are still with us awaiting satisfaction and since they cannot now be satisfied by performance of that obligation, they call for satisfaction in some other way. They call for next-best satisfaction, the closest to full satisfaction that is still available. We need to know the rationale of the obligation, of course, so that we can work out what counts as next best. But once we have it we also have the rationale, all else being equal, for a secondary obligation, which is an obligation to do the next-best thing. If all else is equal, the reasons that were capable of justifying a primary obligation are also capable of justifying a secondary one. I will call this the 'obligation-in, obligation-out' principle. And the explanation for it that I have just sketched out I will call the 'continuity thesis'.[55] It is the thesis that the secondary obligation is a rational echo of the primary obligation, for it exists to serve, so far as may still be done, the reasons for the primary obligation that was not performed when its performance was due.

How does the continuity thesis help us to solve the problem of reparation for wrongs? How does it help to make a case for moral norms of corrective justice? Like this. The normal reason why one has an obligation to pay for the losses that one wrongfully occasioned (i.e. that one occasioned in breach of obligation) is that this constitutes the best still-available conformity with, or satisfaction of, the reasons why one had that obligation. Or to put it more tersely, the reasons why one must pay for the losses that one occasions are the very same reasons why one must not occasion those losses in the first place, when it is true that one must not occasion them. One's reparative act is in

[55] My earlier interpretation of the continuity thesis, in previous drafts of this paper and elsewhere, was much improved by reading Joseph Raz, 'Personal Practical Conflicts' in Peter Baumann and Monika Betzler (eds), *Practical Conflicts: New Philosophical Essays* (Cxambridge 2004), 172 at 189-193, and also by reading unpublished work by Matthew Henken.

at least partial conformity with the original reasons, and if one was bound to conform to the original reason then *ceteris paribus* one is now bound, in turn, to engage in the reparative act. Obligation in, obligation out. For this purpose it matters not whether the obligation in, the primary obligation, is an obligation of corrective justice, or indeed an obligation of justice at all. The fact that one is in some measure making up for one's failure to perform it, namely by redressing the losses that one occasioned, is enough to make the obligation out, the secondary obligation, an obligation of corrective justice.

We can see here the beginnings of an explanation for the distinction, mentioned earlier, between the two classes of cases in which correction may be called for. Some transactions need not be wrongful in order to call for correction. They are wrongful only if they go uncorrected. The ones we have been focusing on, however, call for correction because they are wrongful. In the former class of cases, the corrected transaction leaves too few reasons unsatisfied, or leaves them too insignificantly unsatisfied, to make the transaction wrongful. By correcting one mitigates what would otherwise be a wrong to the point at which it is no longer a wrong, no longer a breach of obligation. One has an obligation to correct precisely because *otherwise* – in the absence of correction - one commits a wrong. In the cases we have been focusing on, however, which are characteristic of the law of torts and the law of breach of contract, such preemptive correction is ruled out. The reasons not to do whatever one did, the thing that now calls for correction, suffice to make that action wrongful even if it is corrected. That is because all possible means of correction, even if conscientiously and promptly implemented, still leave too great a rational remainder behind, too much in the way of unsatisfied or imperfectly satisfied reasons, for the wrongdoing to have been averted by the act of correction alone. In such cases, even if the best corrective justice is done – even if we have truly second-best rational conformity – there remains enough rational nonconformity to make it obligatory not to have

done what one did in the first place, and hence to make it wrongful to have done it. And once we have got this much of a remainder, we mustn't forget to bootstrap in the extra reason for action that consists in the very fact that it was obligatory not to have done what one did, a reason that (as we saw) eludes any kind of even partially-conforming action once the obligation has been breached, and hence increases still further the gap between what one should have done and what one can now do by way of correction. What grounds the obligation to correct is now clearly a wrong. One has an obligation to correct on condition of and by reason of one's breach of another obligation.

Inevitably, when we fall back to the next-best way of satisfying reasons that apply to us we leave behind some remainder, however slight, of unsatisfied reason.[56] That is true in both classes of cases that I just mentioned. What becomes of the remainder? When the same question came up in passing near the start of this section, I said that a reason belonging to the remainder has 'lost its ability to serve as a reason for my doing, or anyone's doing, any of the things that remain available to be done.' I carefully did not say that it lost its ability to serve as a reason for action. The reason remains a reason to perform actions that, if only they were still open to me, would contribute to my conformity with the reason. It is merely that there are now no such actions open to me; any further conformity to the reason is blocked. The reason for action then makes its force felt as a reason for regret and (depending on the details of the case) for various other emotions that respond to those shortfalls in rational

[56] In other words, breach-plus-correction cannot be the rational equivalent of performance. Here we bid farewell to the 'efficient breach' fallacy made popular by O.W. Holmes in *The Common Law* (Boston 1881), 300-1. Yet we also cast doubt on anti-Holmesian attempts, e.g. in *Ruxley Electronics and Construction Ltd v Forsyth* [1996} AC 344, to fill the gap between breach-plus-correction and performance with an extra measure of damages to reflect the so-called 'performance interest'. The gap cannot be filled.

conformity that are already *fait accompli*, meaning that no further corrective actions will mitigate, let alone extinguish, them.[57]

This claim runs up against a common view that assimilates the rationality of emotions to practical rationality.[58] It says that once a reason is remaindered, in the sense just explained, it cannot be a reason for regret or other emotions. One needs a further reason to dwell on the past, a reason that does not, so to speak, simply come down to one from the past but is a new reason now. Anything else is unproductive, and hence irrational.

The blanket association of rationality with productivity is a corruption. To show that regret, guilt and remorse are rational one need not show that there are further reasons now why one should dwell upon the reasons that one did not conform to. That one did not do (even if one could not have done) as the reasons would have had one do means that they are still there, still exerting their pull, and still sufficient, all else being equal, to make one's regret, guilt, or remorse rational. Naturally one may raise new rational objections to the regret, guilt, or remorse. One may object, for instance, that always dwelling on the past is painful, energy-sapping, annoying to others, a waste of valuable time, etc. It is certainly true that everything in one's life is subject

[57] I am not suggesting, of course, that there are no practical consequences of having such emotions. There can be reasons to express such emotions to others, e.g. by confessing or apologizing. Such expression should not be mistaken for further correction according to the continuity thesis. (See further Raz, 'Personal Practical Conflicts', above note 55 at 189-90.) The case for expressing an emotion depends on whether one has that emotion to express, or at least a case to feign it. Not so the case for correction under the continuity thesis. Some quasi-reparative acts (e.g. sending flowers) are best understood as ways of apologizing, and hence depend for their success on the having or feigning of a suitable emotion. There is little use in the law's getting involved here as it cannot do the having or feigning on the wrongdoer's behalf.

[58] I have criticized this view at length in 'The Logic of Excuses and the Rationality of Emotions', *Journal of Value Inquiry* 43 (2009), 315.

to a rolling programme of re-assessment in terms of the ever-changing landscape of reasons, and these often include reasons to move on from the past. All that I am adding is that, through all of this, the original reasons that were not satisfied when they could have been satisfied are still there. There was something one had reason to do, it is now too late, and the reason to do it is now, without further ado, a reason to regret – in some cases to feel guilty or remorseful - that one did not do it.[59]

Perhaps the relative contemporary neglect of the continuity thesis as an explanation of our obligations of corrective justice owes something to the exaggerated association of rationality with productivity. Of course, this association is most closely associated with economists, and more broadly with the utilitarian tradition in moral philosophy out of which the distinct discipline of economics grew. But its appeal may well be broader.[60] It may afflict even some anti-utilitarians, *malgré lui*. Having doubted the rationality of unproductive regret, practically-minded people (and who is more practically-minded than a lawyer?) may tar reparation, as represented by the continuity thesis, with the same brush. Here as with one's emotions, they may say, one needs a further reason to dwell on the past, a reason that does not come down to one from the past but is a new reason starting from now. It is a reason borne of the violation, and hence specific to the post-violation world. This line of thought compounds the economistic mistake of associating rationality exclusively with productivity by failing to notice productivity when it is looking one straight in the eye. The post-violation world, according to the continuity thesis, is defective in respect of someone's conformity with reasons and in this respect it cries out for

[59] A view of the significance of rational remainders similar to mine, and to which I owe a great deal, is that of Bernard Williams. See, for example, his 'Politics and Moral Character' in Williams, *Moral Luck* (Cambridge 1981).

[60] For a defence free of utilitarian trappings, see Rudiger Bittner, 'Is It Reasonable to Regret Things One Did?', *Journal of Philosophy* 89 (1992), 262.

improvement. It cries out for whatever conformity with the same reasons can now, belatedly, be mustered. What one produces thereby is a greater measure of reason-conformity. What could be more productive, more practically rational? So why would one insist, as a condition of rationality, on some *further* productivity in continuing to have and to use the reason when it is still possible to be productive relative to it, in the sense of part-conforming to it? Why would one need, as it were, an *independent* case for doing corrective justice? The case for doing corrective justice according to the continuity thesis is not, after all, the same as the case for regret, remorse, and guilt. It is in a way the opposite case. These emotions are rendered rational, all else being equal, by the impossibility of making things better, by the impossibility of restoring what was lost by what one did. Corrective justice, by contrast, is rendered rational, all else being equal, by the residual possibility of doing so, i.e. by the residual possibility of restoring things, at least in some measure, to where they would have been had one not occasioned their loss.

6. Continuity in tort law: doubts and responses

The normal reason to pay for the losses that one wrongfully occasioned, according to the continuity thesis, is that this constitutes the best still-available measure of conformity with the reasons that one did not conform to in committing the wrong. Can this thesis help us to understand what tort law is for? Certainly it can. Let me mention, and attempt to allay, a few possible doubts about the thesis's suitability for this task.

First doubt. My only examples of the continuity thesis at work, in section 5, were examples of failures to perform promissory, or at any rate voluntarily-incurred, obligations. I promised to take my children to the beach, but didn't. I was contractually bound to pay my fare upfront on the bus, but didn't. Isn't this emphasis on voluntary obligations telling? The continuity thesis seems to hold

in these cases, you may say, only because we naturally interpret the promise or contractual term to include a fallback provision.[61] We interpret the promise to take the children to the beach today as a promise to take them today or, failing that, as soon as practicable. We interpret the contractual term requiring payment of the fare upfront as requiring payment upfront or, failing that, as soon as practicable. That mode of interpretation could possibly help to explain some reparative obligations in the law of contract. But how could we extend it to the law of torts?

First response. True, we naturally interpret a promise or contract as including fallback provisions. But why? The answer is: because it naturally does include such provisions. When we have a primary obligation to ϕ at *t1*, but do not ϕ at *t1*, we acquire, all else being equal, a secondary obligation to come as close as we now can to ϕing at *t1*, where closeness is determined by the reasons for the original obligation. This may involve nearly ϕing at *t2*, or precisely ϕing at *t3*, or (eventually) doing something at *t27* that has something in common with ϕing. Because different acts at different times may have different things in common with ϕing, all of which are rationally salient, there may sometimes be doubts about which of several rival fallback performances we are to opt for. That being so there may sometimes, in the context of a promise or contract, be a need for those involved to settle for one of the rival fallbacks by making a fresh promise or contract about where to go from here. Sometimes, alternatively, one may look for additional information about the original promise or contract to help one identify what would be the best fallback. If, for example, an agreement was made with a specified purpose, the specification of the purpose helps one to select from among various rival fallbacks: all else being equal, the next-best way of

[61] See Barbara Herman, 'Obligation and Performance' in her *The Practice of Moral Judgment* (Cambridge, Mass. 1993).

honouring the contract would be the one that was next-best at serving the purpose. Here we are interpreting the agreement.

But it is not thanks to the interpretation of the agreement that we are bound to do the next-best thing. Rather, it is because we are anyway bound to do the next-best thing, according to the continuity thesis, that we need to interpret the agreement to find out what that next-best thing is. We have the obligation anyway: we have it without needing an agreement to have it (which does not mean that we cannot agree to something different). In tort law we may face similar difficulties in deciding which measure of conformity is the best that remains possible. There, unlike the law of contract, we do not have original agreements to interpret. The norm that we violated was not owed to an agreement. So instead we try to interpret the law of torts itself, or the relevant part of it, hoping to find some clue as to why the tortious behaviour was tortious, from which we can draw conclusions about what would count as an appropriate remedy. The asymmetries between tort and contract here are irrelevant to our present inquiry. It is the symmetry that is relevant. In both settings there can be a need for interpretation because we need to work out how best to correct the wrong, for which purpose we need a rational explanation of its wrongfulness. The continuity thesis holds symmetrically in the two contexts.

Second doubt. The examples of voluntary obligations held another clear advantage in illustrating the force of the continuity thesis. They were examples of *positive* obligations, obligations to confer benefits (taking children to the beach, paying a bus fare). So it is not hard to see how, upon their violation, there could arise positive obligations to take next-best steps. But the obligations that tort law places upon us are largely negative: obligations not to enter another's land without permission, obligations not to injure another by failing to take reasonable care for her safety, and so on. No conferral of benefits is called for. So how come, upon violation, the norms of tort law require the conferral of a

benefit, namely the payment of reparative damages? How can a negative obligation mutate into a positive one like this?

Second response. The distinction between negative and positive obligations is relatively superficial. Take the obligation (breach of which constitutes the tort of negligence at common law) not to injure another by failing to take reasonable care not to injure her. One way to fulfill this obligation is to not injure anybody. But if we do injure somebody, what would count as a next-best course of action? It is too late not to injure. It is also too late to injure less. Is there something else to do? At this point, we need to know more about the rationale for the norm. We need to know why we have the original obligation. Suppose that our injuring people is regulated by the law, in part, because injuries, or what the law classifies as injuries, reduce people's quality of life. Then (all else being equal) the less the reduction in quality of life that an injurer leaves behind, the closer she comes to doing what her obligation existed to have her do. By way of reparation she should pay such things as medical bills (to expedite return of quality of life) and loss of earnings (to limit further consequential slippage in quality of life). Such reparative payment is not the same as not injuring, or injuring less, but in one salient respect – according to one possible reason for the norm against injuring – it might well be the next best thing. Of course there may be other reasons for not injuring apart from this one (e.g. the avoidance of suffering) and they may point towards a different remedial action (e.g. payment for distracting entertainments). Then we are back at the issues discussed in the first response above. Be that as it may, the fact that an obligation is negative does not mean that the reasons for it are incapable of being reasons (and hence as yielding an obligation) to take positive steps as second best when the original obligation is breached.

Third doubt. But can there really be norms such that whether we conform to them or fail to conform to them depends on whether

someone is injured (killed, deprived, etc.) as a result of what we do? And even if there can be, are the primary obligations of tort law like this? If not, how can the payment of money damages to cover losses ever, let alone normally, count as a way of correcting the breach of a primary obligation in tort? How do the damages relate to the wrong if the wrong is not partly constituted by the resulting losses that the damages are supposed to repair?[62]

Third response. There are wrongs that are partly constituted by resulting losses, and some torts are wrongs of this type.[63] The tort of negligence is an example. One does not commit the tort of negligence if one merely fails to take reasonable care not to injure someone; one must actually injure someone *by* failing to take reasonable care not to injure that someone. The resulting losses are a constituent of the tort itself; the norm regulates one's bringing them about. But it is true that many torts (trespass, libel, conspiracy, misfeasance in public office) are not constituted by their resulting losses. All the losses associated with them are *consequential* losses. And even result-constituted torts like negligence can carry additional consequential losses, some of which may be recoverable in the law of torts.

The reallocation of such consequential losses from the defendant to the plaintiff is explained by much the same considerations that were set out in the second response above. What counts as fallback conformity with a norm after its

[62] This challenge can also be addressed to Weinrib, who distinguishes the plaintiff's 'factual loss' from his or her 'normative loss': *The Idea of Private Law*, above note 1, 115ff. The response that follows seems, however, to be unavailable to Weinrib (he seems to deny the factual loss both a constitutive and a justificatory role in relation to the normative loss). I am not clear what his alternative response to the challenge is.

[63] I defended this possibility in 'Outcomes and Obligations in the Law of Torts', in Peter Cane and John Gardner (eds), *Relating to Responsibility: Essays for Tony Honoré on his Eightieth Birthday* (Oxford 2001) and further in 'The Wrongdoing that Gets Results', *Philosophical Perspectives* 18 (2004), 53.

violation is not dictated directly by the constituents of the norm. It depends on the reasons why the norm has those constituents, which often include instrumental reasons. Consequential losses are recoverable in tort because and to the extent that the avoidance of such consequential losses is among the reasons for the tort's being the tort that it is, with the constituents that it has. This explains why different types of consequential losses are recoverable in respect of different torts (e.g. pure economic losses are not recoverable in a suit for negligence, but they are recoverable in a suit for inducing breach of contract). Some torts are torts in order to protect against some types of consequences, and others to protect against other types.[64]

Fourth doubt. In MacCormick's example of the broken promise to go to the beach, the breach was said to be justified. And yet the continuity thesis apparently still applied. In the example of the underpaid bus fare, it was not made clear whether the underpayment was justified or not. Possibly it was only excused; possibly not even that. So justification seems to be irrelevant to the application of the continuity thesis: fallback conformity to the violated norm is called for irrespective of *why* the violated norm was violated. Surely, however, justification is not irrelevant to the law of torts? Surely damages are only due in tort law (or at any rate would only be due in a morally sound tort law) for actions that are wrong in the sense of unjustified? Perhaps one can go further. Perhaps they are only due in tort law (or would only be due in a morally sound tort law) for actions that are wrong in the sense of unjustified *and* unexcused (i.e. faultless wrongs). But be that as it may: justification, at any rate, surely can't be thought irrelevant to tort liability?

[64] Where the common law tort of breach of statutory duty is concerned, the consequences to be protected against are determined, not by the purpose of the tort's existence, but by the purpose of the particular statutory duty, a.k.a. the 'mischief of the statute': *Gorris* v *Scott* [1874] 9 LR (Exch) 125.

Fourth response. That a norm-violation was justified is indeed irrelevant to the application of the continuity thesis, and at the deepest level it is equally irrelevant to the law of torts. Torts are wrongs – breaches of obligation – and one owes damages for their commission even if one's wrong was justified, never mind excused. True, there are some torts, such as the tort of negligence, that are not committed if one acted with certain justifications. That one acted with reasonable (i.e. justified)[65] care means that one did not commit this tort. These are special cases. At first sight they are paradoxical, in a way that was famously pointed out by W.D. Ross.[66] If one did no wrong, Ross pointed out, one has nothing to justify and nothing to excuse. It follows that the question of whether one did wrong must be answered without reference to one's fault, i.e. without yet raising questions of justification and excuse. Ross was onto something here, but he overlooked various logical possibilities. Why could there not be a wrong that one commits by committing, without justification, some other, lesser, wrong? And why could there not be a wrong that one commits by acting, without justification, in a way that does not conform to some other (non-obligatory) reason? The second possibility here requires us to abandon Ross's premiss that wrongs are the only things that call for justification. But we should indeed reject this premiss. It is too strong. Both the mooted possibilities are indeed possible. And some torts – such as the tort of negligence – must be interpreted as realizations of one or other of them. One commits these complex torts by failing to conform to a norm that regulates unjustified nonconformity with some other norms or some other reasons, not themselves norm-given, that are recognized by law.

[65] I argued for this equation in 'The Mysterious Case of the Reasonable Person', *University of Toronto Law Journal* 51 (2001), 373.
[66] *The Right and the Good* (Oxford 1930), 45.

This line of thought gives justification an occasional and derivative role in the law of torts. In general one owes reparative damages for torts as wrongs, never mind whether they are justified.[67] In some complex cases, however, one's action is a tortious wrong only if it is unjustified. One often encounters confusion on this score owing to the fact that we use the word 'wrong' sometimes to mean unjustified. 'I acted wrongly' usually means 'I did an unjustified thing'. But 'I committed a wrong' or 'I acted wrongfully' usually means 'I breached an obligation'. On these interpretations it is possible to commit a wrong or to act wrongfully without acting wrongly, and to act wrongly without committing a wrong or acting wrongfully. Tort law is concerned with the wrongs one committed, one's wrongful actions. It is only sometimes and derivatively concerned with whether one acted wrongly (because some wrongs are committed only by acting wrongly). The continuity thesis likewise. It is concerned with the continuing pull of reasons to be satisfied, even when their prior nonsatisfaction or undersatisfaction was amply justified. Indeed, as MacCormick points out, one way in which one can justify committing the particular wrong one committed, in a situation of conflicting obligations, is by pointing to the fact that the wrong one committed was the easier of the two to repair by later conformity with its rationale. The kids can wait a day or two to go to the beach. The beach will still be there. The student in trouble cannot, *ex hypothesi*, wait a day to be rescued.[68] One wrongs the children, but one is justified in doing so thanks to the

[67] This is the lesson of *Vincent* v *Lake Erie Transportation Co*. 109 Minn. 456, 124 N.W. 221 (1910), interpeted as a trespass case, which in my view is what it is. There are those who interpret it as an unjust enrichment case in order to resist its lesson. For a good catalogue of possible interpretations (siding, ultimately, with the same one as me) see Arthur Ripstein, 'Tort Law in a Liberal State', *Journal of Tort Law* 1 (2007), issue 2, article 3, downloadable at http://www.bepress.com/jtl/vol1/iss2/art3.

[68] MacCormick, 'The Obligation of Reparation', above note 48, at 213.

relative reparability of that wrong. This justification for wronging the children does not affect, but on the contrary presupposes, the application of the continuity thesis.

Fifth doubt. If the continuity thesis applies to tort law, why doesn't tort law sometimes require next-best conformity other than by way of payment of money damages? Why is this kind of payment regarded by law as the only possible fallback?

Fifth response. This is partly because of the feature discussed in the second response above. The obligations imposed by the law of torts are mainly negative obligations. Once there is injury there cannot possibly be no injury. Once there is failure of care there cannot possibly be no failure of care. Positive obligations are in this respect somewhat different. Where there has been no delivery, there can still be a (belated) delivery. Where there has been no start to the building works there can still be a (belated) start to the building works. This can sometimes allow courts to be more creative in the remedies they give for breach of contract, at any rate where time was not of the essence. Even in such cases, however, the courts may be reluctant to give remedies other than money awards. The reasons are those that the courts themselves give. It is normally easier to supervise performance of an obligation to pay money than it is to supervise the performance of other kinds of remedial obligation. It is also normally easier to bypass an uncooperative defendant where money payments are concerned, e.g. by garnishment of earnings or bank accounts. It is also less oppressive to make money awards in cases in which parties who have already fallen out would now be required to collaborate in completing other remedial obligations. Such considerations play a major role in determining how somewhat indeterminate moral obligations, such as moral obligations of corrective justice, should be made more determinate in the law. There is nothing about obligations of corrective justice, or any other obligations, that prevents them from being rendered more

determinate by the law in a way that is sensitive to the various costs and benefits of different ways of doing so. Here the economists clearly have a niche.

Sixth doubt: There has been no mention anywhere of the rights of the person wronged. Surely it is of the essence of the law of torts that it protects the plaintiff's rights by conferring on him further (remedial) rights against the defendant? And surely, as Weinrib says, 'corrective justice singles out a particular plaintiff and a particular defendant and makes the duties of one correlative to the rights of the other'?[69] This being so, how is it possible to explain what tort law is for in terms of corrective justice without once mentioning anyone's rights?

Sixth response: True, I did not mention rights but their role is explained by what I said. In section 4 I said, for example, that 'the reasons why one must pay for the losses that one occasions are the very same reasons why one must not occasion those losses in the first place.' In the context of the law of torts the primary obligation of the tortfeasor, the one that she violates when she commits the tort, is always justified by the interest of the person wronged (together with such other considerations as support the protection of that interest by the imposition of that obligation).[70] It follows that the primary obligation of the tortfeasor, the one that she violates by her tort, is always a rights-based obligation. This explains why, when that right is violated, the person wronged also has, in the law of torts, a right to reparative damages. If the primary obligation is rights-based then so is the secondary obligation, for both – by the continuity thesis – must share the same rationale. Recall the obligation-in, obligation-out principle? By the same logic we could now add the 'right-in,

[69] Weinrib, *The Idea of Private Law*, above note 1, 76.

[70] On the significance of the parenthetical words, see Joseph Raz, 'Rights and Individual Well-being' in his *Ethics in the Public Domain* (Oxford 1994).

right-out' principle: whoever has a primary right (e.g. a right not to be libeled) also gets a secondary right (a right to reparative damages in a libel suit) upon violation of that primary right.

You may think that this is enough to show that the primary obligation in the law of torts must be an obligation of justice after all. Isn't a question of rights always a question of justice? So it is often thought.[71] But the thought is mistaken. The obligation not to torture has, as part of its rationale, the interests of the person who is not to be tortured. Indeed the interests of the person who is not to be tortured suffice to justify the obligation not to torture. We each have, in short, a right not to be tortured. Yet the obligation not to torture that is based on this right is not an obligation of justice. It is an obligation of humanity. Not every right we have is an allocative right, i.e. a right of justice.[72] Nor is the whole of justice taken up with rights. On the other hand, my right to reparation for a violation of my rights is a right of justice. It requires a reallocation of losses as between me and my torturer. Even though it is not an injustice that my torturer does to me when he violates my right not to be tortured, there is a corrective injustice that he does to me if he violates my right to have him make good my consequent losses, if any, afterwards.

Seventh doubt. Surely the proposed explanation is too narrow to explain the whole of the law of reparative damages? Maybe it explains what are known as special damages (damages for loss of earnings, for medical bills, for repairs to houses, etc.) but how does it apply to so-called 'general damages' (damages for pain and suffering, for bereavement, for loss of amenity, etc.)?

[71] See e.g. John Finnis, *Natural Law and Natural Rights*, above note 28, 232; Nicholas Wollerstorff, *Justice: Rights and Wrongs* (Princeton 2008), 10.

[72] For a defence of this view, see my 'The Virtue of Charity and its Foils' in Charles Mitchell and Sue Moody (eds), *Foundations of Charity* (Oxford 2000). Compare Finnis, *Natural Law and Natural Rights*, above note 28, 163-4, discussing the torture example and placing it under the 'justice' heading.

Seventh response. For the most part, the continuity thesis does not explain general damages. By and large they are not reparative in the strictest sense. They are paid in respect of certain irreparable results or consequences of a tort or breach of contract. As such, they cannot be explained directly by the continuity thesis. They require a different rationale. In my view they exist mainly to assuage frustration, resentment, and other kinds of ill-feeling that afflict plaintiffs. Thereby, often enough, they serve as a way to take the heat out of plaintiff-defendant conflicts. How do they do this? Is it just that a cash windfall, which might equally be a lottery win or a tax refund, takes one's mind off one's pain or distracts one from hating one's injurer? No. It matters that the payment of general damages takes a quasi-reparative form, being paid by or on behalf of the tortfeasor, being pegged to results or consequences of the tort, being quantified (notionally) according to the severity of the result or consequence in question, and so on. It matters, in other words, that some of the implications of the continuity thesis are preserved in the norms regulating general damages even though the continuity thesis does not strictly apply. Thereby some of the placatory social meaning of effecting reparation according to the continuity thesis spills over; general damages bask in the reflected glory of special damages. It is no accident, of course, that special damages have this glory. It comes of the fact that correcting a wrong, in accordance with the continuity thesis, is also a way of mitigating a wrong. This gives reparative damages a distinct placatory potential. It is not hard to exploit and extend this potential by creating neighbouring categories of quasi-reparative damages (officially classified as 'reparative') that can be awarded for irreparable losses.

One may accept this line of thought while at the same time being sceptical about at least some of the extension. One may regret that people have come to expect, and are often granted, various kinds of awards that go beyond the strictly reparative. My own sense is that this has got out of hand in the jurisdictions with

which I am familiar. In the United States tort law is clearly a major direct contributor to the excess, with the unprincipled use of so-called 'punitive damages' by juries turning the law of torts into a ridiculous combination of lottery and pillory. But even in England, where both juries and punitive damages in tort cases are thankfully rare, the ideology of 'compensation' – shorn of any strictly reparative objectives - has had an unhappy effect on public culture. This is only partly a direct consequence of tort law's own native doctrines. It is also partly the result of an intellectually immature public law, partly the result of a receeding welfare state, and partly the result of aspects of civil procedure (notably the rules as to costs) which aggravate the chilling effect of tort law itself, and lead to all sorts of spurious payouts to bribe potential plaintiffs out of pursuing speculative litigation. Is this a price we must pay for improved access to justice? Perhaps. Or perhaps we are forgetting that the pursuit of justice can be self-defeating: that attempting to do justice can increase injustice. Corrective justice too can be counterproductively pursued, and increasing access to it, at least beyond a certain point, might add to the counterproductivity. In which case what we are giving is access to injustice.

6. Putting corrective justice in its place

In the following tantalizing passage, which seems to sit rather awkwardly with the rest of his argument, Weinrib comes close to embracing the continuity thesis as an explanation of what corrective justice is for, and therefore (because he thinks this is the same thing) an explanation what tort law is for:

> When the defendant ... breaches a duty correlative to the plaintiff's right, the plaintiff is entitled to reparation. The remedy reflects the fact that even after the commission of the tort the defendant remains subject to the duty with respect to the plaintiff's right. The defendant's breach of the duty not to interfere with the embodiment of the

> plaintiff's right does not, of course, bring the duty to an end, for if it did, the duty would – absurdly – be discharged by its breach. With the materialization of wrongful injury, the only way the defendant can discharge his or her obligation respecting the plaintiff's right is to undo the effects of the breach of duty. Just as the plaintiff's right constitutes the subject matter of the defendant's duty, so the wrongful interference with the right entails the duty to repair. Thus tort law places the defendant under the obligation to restore the plaintiff, so far as possible, to the position the plaintiff would have been in had the wrong not been committed.[73]

In the bulk of this passage, the obligation of reparation is presented as the same obligation as the original obligation, breach of which constituted the tort. It merely now falls, *tant pis*, to be discharged in a second-best way, by payment of reparation. But in the last sentence, the proposal changes. Payment of reparation is now due because the law of torts imposes a new obligation – an obligation of corrective justice. This *volte face* is hard to make sense of. In particular, the 'thus' at the start of the final sentence seems perverse. If the obligation already exists (by entailment, no less) how can it also be imposed by tort law?

One reason why the passage seems to sit awkwardly with the rest of Weinrib's argument is that, if it were true that the so-called secondary obligation is always the same obligation as the primary one, then there would be no norms of corrective justice. We would have no need of them. The norm creating the primary obligation would be the only moral norm we would need; the rest of the work would be done by logic (entailment). Perhaps this threat of corrective justice's imminent redundancy explains Weinrib's otherwise undermotivated thesis that the primary obligation is itself an obligation of corrective justice. For with this thesis in place, the claim that the primary and secondary obligations are one and the same does not have the unfortunate side-effect of making norms of corrective justice redundant. At

[73] *The Idea of Private Law*, above note 9, 135.

any rate, their redundancy is postponed. Or perhaps - a rival possibility – what Weinrib is saying in the passage just quoted is this. Perhaps he is saying that the only norms of corrective justice that exist are those that the law creates to give additional determinacy to what would otherwise be the indeterminate remedial entailments of the primary norm. This would help to explain another Weinribian thesis that otherwise seems undermotivated, namely his thesis that moral norms of corrective justice are owed entirely to the law. His point, we may now think, is not that there are no reparative obligations in morality apart from the law. There are, but they are obligations already entailed by the primary moral norm that is breached. Only when the law intervenes to sharpen them up do they become reparative norms in their own right, and hence corrective justice begins to occupy its own normative space.

If these manoeuvres seem forced, we are now in a better position to understand why. In this passage Weinrib reaches out for, but does not quite grasp, the continuity thesis. He imagines a continuity in the obligation itself. The primary obligation and the secondary one are one and the same. In fact, as we saw, the continuity is only in the reasons why the two obligations exist. Their common rationale is what links them. Uncovering this is in one way good news for Weinrib. It rescues the morality of corrective justice from the oblivion or near-oblivion that his own distorted version of the continuity thesis would inflict upon it. On the other hand, it also deprives Weinrib of his doctrine of the autonomy of corrective justice. It shows that we need reasons from beyond the morality of corrective justice to explain the morality of corrective justice. We need to know the reasons why certain obligations, not being obligations of corrective justice, exist. For these are none other than the primary obligations of tort law, the rationale of which is also, in each case, the rationale for the secondary obligations of tort law to which breach of the primary obligations gives rise. These secondary obligations are, and cannot but be, obligations of corrective justice. So there is no

tort law without corrective justice. On the other hand there has to be more to tort law than corrective justice. And there is also corrective justice beyond tort law, and indeed beyond law. It exists in raw morality too, in the raw morality of trips to the beach, students in trouble, and disappointed children. Private law can (and may be needed to) make such obligations more determinate than they would be in their raw moral form, but it is not needed to bring them into existence in the first place.